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June 4, 2010

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

**ENTERED
Office of Proceedings**

JUN 4 2010

**Part of
Public Record**

**Re: MC-F-21035, Stagecoach Group plc and Coach USA, Inc., et al.—
Acquisition of Control — Twin America, LLC**

Dear Ms. Brown:

On June 2, 2010, counsel for Continental Guest Services Corporation ("CGSC") submitted to the Board a copy of the transcript of a May 27, 2010 hearing in the state court case about which we have previously written. *Continental Guest Services Corp. v. International Bus Services, Inc., et al.*, No. 600643/10 (NY Sup Ct. filed March 12, 2010). Justice Ramos, who is presiding over that antitrust action, did not rule on the merits of the matters before him at that hearing, namely, the issuance of a preliminary injunction sought by plaintiff CGSC and a motion to dismiss filed by defendants, which include certain of the Applicants in this Board proceeding. Instead, he asked for further briefing on possible modification of the outstanding TRO (letter briefs now have been submitted), directed the parties to engage in court-supervised mediation and took the pending motions under advisement. We will advise the Board when a decision is issued.

CGSC counsel notes in his June 2 letter that during the May 27 hearing he quoted from the confidential document about which Applicants have previously corresponded with him and the Board. (The document had been submitted to the court by CGSC as part of Exhibit C to the Affidavit of Betty Zhangs, a copy of which CGSC had filed with the Board on May 10.) CGSC counsel proceeds to argue that his action quoting in open court from a small portion of a document that Applicants had designated as confidential under this Board's Protective Order provides a reason for rejecting Applicants' designation of that document as confidential. In other words, counsel is saying that because he opted during a court hearing to quote two lines from a

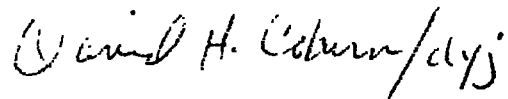
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document he knew was designated as confidential under the Board's Protective Order, the document should no longer be deemed confidential.

Aside from the obvious impropriety and illogic of CGSC's position, the fact is that under the terms of the Board's Protective Order entered in this proceeding on January 29, 2010 the document remains confidential unless that designation is challenged under the procedures set forth in section 5 of the Protective Order and the Board finds the document not to be confidential. Here, CGSC (which has heretofore chosen to ignore this Board's processes and its Protective Order) has raised no such challenge under the Protective Order. Neither has any party to this proceeding. Further, the fact remains that the document contains strategic information that would be of interest to competitors. The Board accordingly should continue to maintain the confidentiality of copies of the document filed with it by CGSC and NYSAG, and of references to the document in any such filings.

Finally, Applicant International Bus Services, Inc. has replied to CGSC's opposition to IBS's motion filed in the court case to seal the relevant document and related materials at issue. See attached. CGSC has argued to the court that the reply is untimely and IBS has responded. The motion to seal remains pending before the court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David H. Coburn/dy".

David H. Coburn
Attorney for Applicants Stagecoach Group
plc; Stagecoach Transport Holdings plc.;
SCUSI Ltd.; Coach USA Administration,
Inc.; Coach USA, Inc.; International Bus
Services, Inc.; CitySights Twin, LLC; Mr.
Zev Marmurstein; and Twin America, LLC

cc: All parties of record
Mr. Mark Berman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Continental Guest Services Corporation,

Plaintiff,

- against -

International Bus Services, Inc., d/b/a/ Gray Line
New York, City Sights Twin, LLC, d/b/a/ City
Sights New York, Twin America, LLC, Battery
Park Hotel Management, LLC, Hampton Inn
Times Square North, Hilton Garden Inn Times
Square, New York West 35th Street HGI, On the
Ave Hotel, The Paramount Hotel New York, Park
Central Hotel (DE), LLC, Thirty East 30th Street
Owner, LLC, Times Square Hotel Operating
Lessee LLC, Lexington Hotel, LLC, W2001
Metropolitan Hotel Operating Lessee, LLC, and
Highgate Hotels, L.P.,

Defendants.

Civil Action No.: 600643/10

I.A.S. Part 53

Justice Charles E. Ramos, J.S.C.

Motion Seq. No. 5

**DEFENDANT INTERNATIONAL
BUS SERVICES, INC.'S REPLY
MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO SEAL
CERTAIN MATERIALS FILED BY
PLAINTIFF**

By order of Justice Ramos, these motion
papers may not be taken apart or
otherwise tampered with

**MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT
INTERNATIONAL BUS SERVICES, INC.'S MOTION TO SEAL CERTAIN
MATERIALS FILED BY PLAINTIFF**

Defendant International Bus Services, Inc. ("IBS") submits this Memorandum of Law in further support of its motion for an order placing under seal: (1) the Affidavit of Betty Zhang, ("Zhang Affidavit") (Docket No. 16 through 16-7); and (2) Plaintiff's Memorandum Of Law In (a) Further Support Of Its Application For A Temporary Restraining Order And Preliminary Injunction, (b) Opposition To The Motion/Cross-Motion To Dismiss Filed By Defendants, And (c) Opposition To The Motion To Stay Discovery Filed By The Bus Company Defendants ("Pl. Memo. of Law" or "Memo. of Law") (Docket No. 18).

Preliminary Statement

The most surprising aspect of this motion is Plaintiff's refusal to consent and its insistence on placing this issue before the Court. The operative facts are not disputed:

- In a parallel proceeding the STB entered a Protective Order prohibiting the public disclosure of information designated Confidential.
- IBS duly designated certain documents Confidential under that Order and never waived its protection.
- The New York Attorney General filed briefs containing unredacted portions of this Confidential information and when this was brought to the STB's attention, the STB removed that material from its public website and instructed the Attorney General to file redacted versions.
- The Attorney General filed redacted versions but failed to redact Exhibit 1. The STB removed it again.
- The information in question thus became available through no fault of IBS, remains subject to the STB Protective Order, and is no longer available on the STB website.

It is important to recognize what IBS is *not* requesting. IBS does *not* ask this Court to claw back the documents that were inadvertently made available to Plaintiff. IBS does *not* ask this Court to prohibit Plaintiff from using the documents in these proceedings. IBS does *not* argue that Plaintiff acted improperly by obtaining the documents. IBS simply asks this Court not to permit Plaintiff gratuitously to harm IBS by evading the protections ordered by the STB.

In view of the reasonableness of this position, we had hoped Plaintiff would consent to an appropriate order, or at least not oppose this application. We were mistaken. Rather than

frustrate an order of the tribunal that has exclusive jurisdiction over a large part of this case, we respectfully submit that the Court should enter IBS's proposed order.

Argument

1. Plaintiff's Factual Arguments Are Irrelevant

Plaintiff suggests that IBS was not diligent in protecting its rights. This simply is not correct. Plaintiff argues that it was able to obtain Exhibit 1 after IBS had objected, but IBS cannot control how the STB manages its public website; it can only object after the fact. Plaintiff presumes that the STB re-posted Exhibit 1 after the Attorney General filed its revised papers "to make it publicly available" (Pl. Opp. at 5) when, in fact, that posting was a routine matter, reflected no such judgment, and was taken down after it was brought to the STB's attention.¹ Despite the lapses during which Exhibit 1 was posted on the STB website, the document has now been removed and Plaintiff does not argue otherwise. Nor does Plaintiff make any real attempt to argue that the document was not subject to the Protective Order entered by the STB.²

Plaintiff notes that IBS seeks to have Plaintiff's entire motion and the accompanying Zhang affidavit filed under seal. Plaintiff does not identify any prejudice to itself if the Court were to seal the current versions of the brief and affidavit; as noted above, IBS does not object to Plaintiff's use of Exhibit 1, so long as IBS' confidential information is not available

¹ The STB's Protective Order incorporates a process under which a party's designation of a document as confidential may be challenged. No party to the STB proceeding has challenged IBS's designation of the document at issue, and neither has Plaintiff.

² Plaintiff points out that the parties have not yet entered into a confidentiality stipulation in this proceeding (Pl. Opp. at 6). Plaintiff's papers on this motion were filed *one day* after the May 27 hearing at which discovery was addressed. IBS expects a confidentiality agreement consistent with the Court's model order to be entered at the appropriate time as the parties proceed with discovery. Presumably, Plaintiff wants its own confidential information protected as well.

to competing sightseeing operators (who stand to benefit from learning Twin America's cost structure and efficiencies). However, IBS would agree to Plaintiff filing redacted versions, omitting only the Confidential matter, and placing everything else on the public record. This does not deny the public access to the courts or court documents; it only preserves the duly authorized confidentiality. IBS would be willing to provide the Plaintiff and the Court with redacted versions of the disputed documents for public filing, but regardless of Plaintiff's agreement to such a procedure the filings in their present form should be sealed.³

A fair reading of the correspondence attached by Plaintiff to its papers confirms that IBS has acted reasonably while Plaintiff has pursued a strategy of making this litigation as difficult as possible.⁴ The bottom line remains that Plaintiff has not been prevented from relying on Exhibit 1 if it chooses to, but simply is being asked to file its papers with redactions of material designated Confidential, just as plaintiffs do in every case in which a protective order is in effect. IBS respectfully requests that Plaintiff's intransigence be rejected and that the motion be granted.

2. Plaintiff's Legal Arguments Are Irrelevant And Misread The Applicable Law

Plaintiff agrees that Section 216.1(a) of the Uniform Rules of the New York State Trial Courts permits a court to seal records for "good cause." See Pl. Opp. at 3. The principal "good

³ Plaintiff's other arguments already have been shown to be without merit. Specifically, the fact that Professor Willig relied on one item of data found in Exhibit 1 does not waive the Confidentiality of the entire document.

⁴ To the extent that Plaintiff takes issue with the timing of this motion, IBS notes that Plaintiff filed the Zhang Affidavit and its Memo. of Law with this Court on Friday, May 7, 2010. On Monday, May 10, 2010, attorneys for Twin America wrote to counsel for Plaintiff advising him that "Exhibit 1 to Dr. Chan's Declaration was designated as confidential under the Protective Order issued in the STB proceeding" and requested that he "please take appropriate steps to keep this document confidential in this litigation, any submissions to the STB, and in any other venue." See Letter from D. Coburn to M. Berman, May 10, 2010.

cause” for which the Court should enter IBS’s proposed order is to avoid frustrating the Order entered by the STB, which exercises exclusive jurisdiction over the question of whether the formation of Twin America was proper. Plaintiff argues that “this Court is not subject to the jurisdiction of the STB or a protective order issued by the STB, just like the STB is not subject to the jurisdiction of this Court.” Pl. Opp. At 6. This overlooks the applicable law of preemption and abstention, but in any event, responsible tribunals do not act in disregard of the jurisdiction exercised and orders entered by coordinate tribunals. And it is hard to deny the commercial sensitivity of the documents at issue; indeed, Plaintiff does not attempt to do so.

Plaintiff insists that *Grande Prairie Energy LLC v. Alstom Power, Inc.*, 5 Misc. 3d 1002(A), 2004 WL 2295660, at *2 (Sup. Ct. N.Y. Co. 2004) (Ramos, J.), a decision with which the Court is familiar, holds that good cause to seal must be shown through “a sworn statement by the client itself.” Pl. Opp. at 3 (emphasis added). In fact, after noting that the mere fact that the parties there had entered into a confidentiality agreement was insufficient to seal a file, this Court held that “[t]he parties [did] not provide[] the Court with *any* reason to seal the file. Accordingly, it [was] impossible for the Court to make an independent determination of good cause to seal.” *Id.* (emphasis added). The court noted that it would reconsider its decision if “the parties provide[d] the Court with an affidavit from a person with knowledge explaining why the file or certain documents should be sealed.” *Id.* Here, the “good cause” is amply provided by the interest in not frustrating the STB’s jurisdiction and Order, and the declarations and affidavits previously filed amply illustrate the undisputed business significance of the information designated Confidential.

Although Plaintiff attempts to distinguish *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499 (2d Dep’t 2007), it concedes, reluctantly, that the Court in that instance

"determined that . . . certain documents would be sealed." *See* Pl. Opp. at 7. Plaintiff correctly notes that the *Mancheski* court considered the "presumption that the public has [a] right of access to the courts to ensure the actual and perceived fairness of the judicial system" (Pl. Opp. at 7), but Plaintiff fails to note that the motion to seal proprietary financial information was *granted* in spite of this consideration. *Mancheski* at 502. In fact, the court found that "[t]here was... a compelling interest in sealing the documents containing [defendant's] proprietary financial information because disclosure could harm the private corporation's competitive standing." *Id.*

Plaintiff also points to the *Mancheski* trial court's refusal to seal certain exhibits that were already "made public." (Pl. Opp. at 7). As Plaintiff very well knows, not only has the STB removed the erroneous filing containing IBS' proprietary document and information, but it also has refrained from posting any portion of Plaintiff's documents at issue in the instant motion before this Court. Accordingly, at this time the only documents that IBS seeks to seal in this motion are those made public by Plaintiff in its own filings.

Conclusion

For the foregoing reasons, IBS respectfully requests that its motion to seal the Zhang Affidavit and Pl. Memo of Law be granted, and that its proposed order be entered

Dated: New York, New York
June 1, 2010

Mayer Brown LLP

By:  _____

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S. Christopher Provenzano

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*Attorneys for Defendant International Bus
Services, Inc.*

CERTIFICATE OF SERVICE

I certify that I have this 4th day of June 2010 served a copy of the foregoing Letter of Applicants by Federal Express on the parties of record listed below and on counsel for Continental Guest Services Corporation:

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Federal Motor Carrier Safety Administration
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Washington, DC 20590

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Antitrust Division
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Washington, DC 20530


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Office of the General Counsel
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